In the United States Court of Appeals

For the Ninth Circuit

No. 12718

WILLIAM EWALD ANDERSON,

Appellant,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service, for the Seattle District,

Appellee.

Upon Appeal From the United States District Court for the Western District of Washington Northern Division

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Honorable Lloyd L. Black, *Judge*

BRIEF OF APPELLANT

Edwards E. Merges,
Attorney for Appellant.

1511 Smith Tower,
Seattle, Washington.

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BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

The appellant respectfully contends that the District Court of the United States for the Western District of Washington, Northern Division, had jurisdiction of this cause below, and that the United States Court of Appeals for the Ninth Circuit has jurisdiction of this cause upon appeal to review the order in question under:

> Section 41, subsection 22 of the United States Judicial Code, United States Code Annotated, Title 28, Section 41, subdivision 22, page 643,

which reads as follows:

> *"Suits under immigration and contract labor laws.* Twenty-second. Of all suits and proceedings arising under any law regulating the immigration of aliens, or under the contract labor laws. (Mar. 3, 1911, c.231 Sec. 24, par. 22, 36 Stat. 1093)."

That the United States Court of Appeals also has jurisdiction upon appeal under the "Administration Procedures Act", Sec. 10a 60 Stat. ch. 324, 5 U.S.C.A. Sec. 1001 et seq. which reads in part as follows:

> "(a) Right of Review—Any person suffering legal wrong because of any agency action or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

Appellant respectfully contends that the petition for writ of habeas corpus, as set forth in pages 1 to 4, inclusive, of the transcript of record, shows the existence of the jurisdiction above referred to.

STATEMENT OF THE CASE IN BRIEF

The appellant was born in the United States. He later became a Canadian citizen and later returned to the United States to live. The United States Immigration authorities have ordered the appellant deported on the ground that he is a Communist. The Immigration authorities base their finding that the appellant is a Communist upon ex parte affidavits of third parties.

The salient facts of the case are not in dispute and the principal question presented is whether or not in view

of them, the Immigration authorities have accorded the appellant a fair hearing and arrived at a just conclusion.

STATEMENT OF THE CASE IN FULL

The facts and background of this case appear from the appellant's undisputed testimony (T.R. 40 to 90), from the "Findings of Fact" made by the District Court (T.R. 23 to 27) and from the records and files, rulings and opinions of the Immigration authorities. Due to the fact that this case covers period of approximately ten years, a statement of the facts must be somewhat longer than usual, but as briefly as possible, it is the following:

The appellant was born in Grande Marais County, Michigan, on August 16, 1902. He lived with his parents in the State of Montana until 1915 at which time, his mother and father separated and he accompanied his mother to British Columbia where he lived until 1920. In 1920 he returned to the United States and lived with his father until 1922 when he again returned to Canada and remained until 1935. While in Canada in 1926, he took out naturalization papers as a Canadian citizen in British Columbia in order to engage in fishing in Canadian waters.

He was married to his first wife, a Canadian, in Vancouver, B. C. on August 28, 1923, and divorced from her on March 31, 1939.

In 1935 the appellant returned to the State of Washington and went to live in the City of Aberdeen. From the time of his arrival in 1935 until 1937, he was employed by the Wilson Brothers Lumber Mills, and in August of 1937, he became Secretary-Treasurer of District Council No. 3 of the International Woodworkers of America, located in Aberdeen.

The appellant continued as Secretary-Treasurer of the Union in Aberdeen until December of 1938 when he was chosen as a delegate to represent his district of the Union at a convention session in British Columbia. He went to British Columbia as a delegate to the convention and on January 2, 1939, at the conclusion of the convention, started back to the United States on a bus from Vancouver, British Columbia. He was stopped at the border by Immigration officers and was given a hearing before a Board of Special Inquiry at Blaine, Washington. The Board of Special Inquiry excluded the appellant from the United States on the ground that he was an immigrant, not in possession of an unexpired Immigration visa, that he was a person likely to become a public charge, and that he was one who admitted committing a crime involving moral turpitude, to-wit, adultery. This ruling of the Board of Special Inquiry was appealed to the Board of Review in Washington, D.C. during which time the appellant remained in Canada. The Board of Review in Washington, D.C. sustained the excluding decision upon the

sole ground that the appellant was not in possession of an Immigration visa. The charge of moral turpitude and the charge that he was a person likely to become a public charge were dismissed. The opinion of the Board of Review dated March 11, 1939, contained in "Part I" of the Immigration files read as follows:

> "The remaining question is whether permission to reapply should be authorized when the alien is in possession of an appropriate visa. From the facts disclosed from the present records, should the alien obtain an Immigration visa he would be admissible to the United States. He would not be inadmissible as one coming for an immoral purpose even though then intending to resume living with Gladys Emma Estep Terpening by virtue of the Supreme Court's decision in *Hansen v. Haff,* 291 U.S. 559.
>
> "It is recommended that the *excluding decision* be affirmed on the ground that the alien is an immigrant not in possession of an unexpired Immigration visa.
>
> *"It is further recommended that the alien be granted permission to reapply for admission when in possession of an appropriate Immigration visa."*
>
> (Italics ours)

As soon as the appellant was advised of the decision of the Board of Review he made formal application at the office of the American Consul General in Vancouver, British Columbia, for the issuance of a permanent visa. Numerous hearings were had extending over a period of several months. *As a result of the hearings the appellant was issued a permanent visa by the Consul*

on August 8, 1939, *at Vancouver,* and immediately made plans to return to the United States. (In the meantime, and on July 19, 1939, he had married his present and second wife, a native born citizen of the United States, and the mother of two children.)

The appellant, on the following day, which was on August 9, 1939, began to board the train at Vancouver, British Columbia, for the purpose of coming to the United States. He was intercepted at the train by Immigration officers and brought before a Board of Special Inquiry at Vancouver, British Columbia. Another series of hearings were held by the Board which lasted for a period of approximately thirty days, or until September 8, 1939, at the conclusion of which hearings the appellant was excluded from admission to the United States, this time on the ground that he was a member of the Communist Party.

Records of these hearings appear in "Part I" of the Immigration files and disclose that the only evidence that the Immigration authorities had to the effect that the appellant was a member of the Communist Party were *ex parte* statements of three witnesses, namely, Clark, Vekich, and Deskins. *The record of the hearings further discloses that the statements of these three men were produced entirely ex parte. The appellant was not given the right to confront any of the three witnesses, nor, to cross-examine them in any manner, nor to be represented by counsel.*

The appellant immediately noted an appeal from the excluding decision, and while the appeal was pending he entered the United States on January 3, 1940. The appellant's visa had not been revoked by the American Consul, but he entered the United States without inspection by the Immigration authorities. The appellant went immediately, upon entering the United States, to his home in Aberdeen, Washington, and surrendered himself to the Immigration authorities for inspection. The Immigration authorities did not confine nor immediately deport the appellant, but he was subsequently indicted for illegal entry and served a period of approximately nine months in the Federal road camp at Dupont, Fort Lewis, for illegal entry.

"Part II" of the Immigration file contains the opinion of the Board of Immigration Appeals dated September 18, 1942, rendered by the Board of Immigration Appeals during the time the appellant was confined at the Federal road camp. *The opinion of the Board of Immigration Appeals did not sustain the Board of Review's holding that the appellant was a Communist;* and, in the course of its opinion, said:

> "The Board of Special Inquiry developed the Act of 1918 charges through the introduction of three *ex parte* statements of three individuals who, it is alleged, are rivals of this alien in labor affairs of the Pacific Northwest. *The alien was not confronted with these individuals, and apparently his only means of rebutting the contents of their statements*

was by his repeated assertion that he was not a Communist and never had been. The procedure of a Board of Special Inquiry does not permit the alien's representation by counsel nor the right of confrontation of witnesses and the alien's cross-examination of adverse witnesses. Thus it is not a wholly adequate procedure to determine such a disputed factual issue as is presented in this case."

(Italics ours)

The Board of Immigration Appeals held that the petitioner had entered the United States unlawfully, but gave him permission, in its ruling, to apply for suspension of his deportation. This appears on page 4 of the same ruling contained in "Part II", and reads as follows:

"ORDER:

It is ordered that the case be reopened to permit the alien to file an application under the provisions of Title 8, Code of Federal Regulations, Section 150.6 (g), for suspension of deportation. . . ."

The appellant thereupon filed his petition for suspension of deportation and after his release from the road camp further hearings were had covering the years 1943, 1944, during which time the appellant lived in Seattle with his second wife and adopted sons, working on the Seattle waterfront as a marine rigger to support them.

Attention is respectfully redirected to the fact that the only evidence that the Government produced prior to this time relating to the appellant's membership in the Communist Party was the *ex parte* statements of

the three witnesses, Clark, Vekich and Deskins. When the new series of hearings began in 1943, upon the appellant's application for suspension of deportation, the Immigration authorities were, for some reason, unable to produce the witnesses, Clark and Vekich. The only one of the three which they produced was Deskins. Upon the hearings begun in 1943 the appellant was this time permitted to be represented by counsel, and when the witness, Deskins, was produced by the Immigration authorities on July 6, 1944, he, Deskins, after much cross-examination, recanted his affidavit that appellant was a Communist, and testified as follows: (See Part IV of Immigration files relative to the examination conducted July 6, 1944, page 151.)

> "By Counsel to Witness: Among other things, you say, in the second to the last paragraph, 'I am of the firm belief now that Mr. Anderson is not, as previously accused, a member or affiliated with any organization whose principles are contrary to the best interests of these United States.'
>
> Answer: Well, that is exactly what I have been saying, Judge, it is my opinion now that Anderson is not and at the time the statement was given there he was not at that time a member of any organization advocating the overthrow of the Government.
>
> Question: By that you mean that he was not a member of the Communist Party at the time?
>
> Answer: Yes.
>
> Question: Or at any time since that time?
>
> Answer: Yes.

QUESTION: And your testimony further is, if I understand you clearly, Mr. Deskins, that you have no positive proof or evidence that he was a Communist. Is that true?

ANSWER: Definitely, I have no positive proof, no.

QUESTION: Did you ever see him advocate, write any articles or anything of that character over his signature advocating the overthrow of the Government by force of arms?

ANSWER: No, definitely not. As I have said previously, these meetings which I attended as a member of the Communist Party and which I presumed to be closed meetings of the Communist Party, at that time almost all of the discussions pertained mostly to local matters in the Grays Harbor county, and we were having conflict within the Union for control, and that was almost the entire nature of these meetings."

The Immigration authorities produced five witnesses at the 1943-44 hearings, namely Shanley, Davenport, Gillespie, Penning and Lant. Transcript of their testimony may be found in Part VI of Immigration files. Shanley testified, under examination by the Immigration inspector, that he was a citizen of the United States, married and a logger by occupation, employed by McCorkle Brothers, Raymond, Washington, and that he knew the appellant in 1937. (page 35). He then testified that he did not know whether the appellant was a member of the Communist Party, but that he, the witness, saw Anderson at one meeting where "I feel sure that only members were present". (page 36) He

testified on cross-examination, however, as follows: (page 39)

Q. Was anything said at that meeting that evening with the idea, to the effect rather, of overthrowing the United States Government by force of arms?

A. At that meeting?

Q. Yes.

A. No.

Q. Was there anything said there about printing any books or pamphlets advocating the overthrow of the United States Government?

A. Not at that meeting that I can recollect.

* * * *

Q. In other words, they were discussing the conditions that prevailed in the International Woodworkers of America?

A. Yes.

Q. Did the petitioner, William Anderson, attend any other meetings except this one you have mentioned?

A. No, not to my recollection.

Q. That is the only one?

A. Yes. the only one. (page 41)

Q. You never heard any statements made by Mr. Anderson in any of the meetings of the International Woodworkers of America that were un-American?

A. No.

The witness, Charles Arthur Davenport, began testimony on page 46. He testified that he was a millworker by occupation and was employed by the Hart Mill Company in Raymond, and that he had been a member of the Communist Party from 1937 to 1938. He further testified that he knew the appellant in Raymond through the activities of the union. (page 46) He testified that he had seen the appellant at one Communist meeting, but on cross-examination by counsel testified as follows: (beginning page 51)

Q. As I understand your testimony on direct examination, it was to the effect that you do not know whether Mr. Anderson was a Communist or not or whether he belonged to the Communist Party or not?

A. No. I don't.

Q. You never heard that he belonged to the Communist Party?

A. I might have heard it. I heard that about lots of people.

Q. But you had no personal knowledge of it?

A. I did not.

* * * *

(Beginning on page 52):

Q. Did you at any time ever personally hear Mr. Anderson advocate the overthrow or destruction of the American Government by force or violence?

A. I did not.

Q. Did you ever hear of him having advocated such a policy either publicly or privately?

A. No, sir.

* * * *

Q. On the contrary, his general reputation throughout that entire district was one of being a peaceful, law-abiding citizen?

A. To my knowledge, yes.

Q. Furthermore, to your own personal knowledge, that was the general reputation he enjoyed in that extensive territory?

A. As far as I know.

(Page 53)

Q. I am not going quite so far as to hate, I mean to dislike.

A. As far as personalities are concerned, I never cared for Mr. Anderson nor he for me.

(Page 55)

Q. Mr. Davenport, did you ever, in talking with Mr. Anderson, hear him say anything which would lead you to believe that he was a member of the Communist Party?

A. No, I never did.

The third witness produced by the Immigration authorities was Vilas Gray Lant, whose testimony begins on page 58. He stated that he resided in Aberdeen and worked as a carriage rider in a lumber mill. He testified (on page 59) that he recalled attending two open meetings where the appellant was present at Aberdeen. On cross-examination, however, this witness testified as follows, beginning on page 67:

Q. Did you ever hear Mr. Anderson advocate the overthrow of the United States Government by force of arms?

A. No, I never did.

Q. Did you ever know of Mr. Anderson, or ever hear of him being accused of having written any articles, papers in which he advocated the overthrow of the United States Government by force of arms?

A. No, I can't say as to that.

Q. In this meeting that you attended of the Communist Party was there anything stated there in that meeting advocating the overthrow of the United States Government by force of arms?

A. No.

Q. Was there anything written, published, pamphlets in which they advocated the overthrow of the United States Government by force of arms?

A. Not that I recall.

The Immigration authorities then produced Ward Penning as a witness. His testimony begins on page 184. He testified that he was a citizen of the United States and a resident of Aberdeen, Washington, and had known Anderson since 1937. He testified on page 185 that he had seen Anderson in company with men whom he believed to be Communists. This witness testified that he at no time had any personal knowledge that Anderson was a Communist, and under cross-examination, on page 186, testified as follows:

Q. Did you ever hear Mr. Anderson advocate the overthrow of the United States Government by force of arms?

A. No.

Q. Did you ever know of him printing any articles in which he advocated the overthrow of the United States Government by force of arms?

A. I can't say that I did.

It further appeared, under cross-examination on page 187, that this witness had some feeling against the appellant for personal reasons. He testified that he, the witness, had been employed by the Department of Labor and Industries but had been discharged, and under questioning said:

Q. Did you have any feeling against Mr. Anderson thinking that he was at the bottom of that?

A. I know of one case when I was working for the government where Mr. Anderson took a personal stand against me. When I was an enumerator for the government he objected to my being employed as such.

Q. Was it for the Department of Labor and Industies?

A. No, for the government. I was employed as enumerator for the last census. I was informed that Mr. Anderson protested my employment.

Q. When was that?

A. 1940.

Under cross-examination, on page 189, speaking of the activities of Anderson in the Union, the witness testified as follows:

Q. Did you ever hear him advocate anything un-American all those years that he was Secretary?

A. Not that I know of.

The fifth and last witness produced by the Immigration authorities was John B. Gillespie, whose testimony begins on page 190. He testified that he was a resident of Aberdeen, Washington, and was Captain of the Police Department in the city of Aberdeen and a citizen of the United States, and had been acquainted with Anderson for five or six years. The witness testified as follows, under cross-examination, page 192:

Q. In your statement you said: "He (Mr. Gillespie) further stated that while he believes that Anderson is a member, or has been a member of the Communist Party in Aberdeen, he has no definite knowledge or proof that such is the case." Is that correct?

A. Yes, sir, that's right; that was the general talk here in Aberdeen.

This witness further testified on page 193:

Q. Mr. Anderson never did give the Police Department any trouble?

A. No, sir, he didn't.

On July 25, 1944, the Seattle Immigration Inspector Gates made "Findings of Fact and Conclusions of Law" proposing that appellant's application for suspension of deportation be denied. Inspector Gates reaffirmed his opinion on May 9, 1945, and on August 24, 1945, the matter was argued before the Board of Immigration Appeals in Washington, D.C. *No action on the case was taken by the Board of Immigration Appeals from August* 24, 1945, *until January* 4, 1948. During that time

the appellant remained in Seattle with his wife, and boys, and led an entirely normal life working at his trade as a barber. *Apparently the Board of Immigration Appeals did not find that the appellant was a serious enough menace to decide the case in any reasonable length of time.*

We now invite attention to the opinion of the Board of Immigration Appeals contained in "Part VI" and bearing date of January 5, 1948. After a review of the facts of the case, the opinion, on page four, states the following:

> "The last remaining question in connection with the second lodged charge is whether there was substantial evidence before the board of special inquiry upon the basis of which it was warranted in concluding that respondent was a member of the Communist Party of America and that the Communist Party of America advocated and distributed literature advocating the overthrow of the Government by force or violence. See Matter of Miguez, 56019/547 (October 1, 1943); Matter of Soto-Quintana, 6388210 (Jan. 13, 1947); cf. *Doskaloff v. Zurbrick,* 103 F. (2d) 579 (C.C.A. 6, 1939). Hence, so far as the second lodged charge is concerned, we are limited in our review to the evidence taken by the board of special inquiry at Vancouver at the hearings beginning on August 9, 1942, and terminating on September 6, 1942, and only that evidence. We shall not set forth the voluminous evidence developed by the board of special inquiry on these issues. *We simply point out that the statements of the witnesses Deskins (Ex. H of Ex. D) Clark (Ex. F of Ex. D) and Cekisch (Ex. G of Ex.*

D), together with respondent's statements before the American Consul at Vancouver (Exs. B and C of Ex. D) contain sufficient evidence to support the conclusion reached by the board of special inquiry that respondent was a member of the Communist Party of America. Again, the board of special inquiry was warranted in finding, on the basis of Exhibits L-P that the Communist Party of America was an organization that advocated and distributed literature advocating the overthrow of the American Government by force or violence. The second lodged charge is therefore sustained." (Italics ours)

Pursuant to the opinion just above quoted, A. R. Mackay, Chief, Exclusion and Expulsion Section, Immigration and Naturalization Service, issued a warrant of deportation commanding that appellant be deported to Canada on the charges and on the grounds set forth in the order of the Board of Immigration Appeals, and thereafter and on March 12, 1948, appellant, through his present counsel, made application for stay of deportation on the ground that the appellant's physical condition was such as would result in the impairment of his health, which application was denied. Thereafter and on May 7, 1948, appellant requested a reopening of the proceedings to permit appellant to present additional evidence showing that appellant had adopted the two minor children of his wife and that his deportation would result in serious economic detriment to them, which application was denied by the Board of Immigration Appeals June 9, 1948.

Thereafter, and on the 7th day of September, 1948, the appellant sued out of a writ of *habeas corpus* in the District Court for the Western District of Washington. Hearing upon the writ was had on July 19, 1949, at which time the testimony appearing in the T.R. 40 to 92, inclusive, was taken.

The Court then took the matter under advisement until November 4, 1949, at which time it announced its oral decision dismissing the writ and continuing the case for the purpose of giving further reasons for its decision (T.R. 96). On December 14, 1949, the District Court rendered another oral opinion, again dismissing the writ. Thereafter and while the Court had proposed Findings, Conclusions and Judgment under consideration, the appellant, on March 17, 1950, filed a motion for reconsideration and for judgment notwithstanding the oral decision of the court, such motion being based upon the decision of the United States Supreme Court on February 20, 1950, in the case of *Wong Yang Sung v. McGrath,* 339 U.S. 33 (T.R. 15 and 109). This motion, after further argument, was denied on June 22, 1950 (T.R. 109). Thereafter and on July 27, 1950, the Court signed Findings, Conclusions and Judgment, dismissing the writ. This appeal results.

ASSIGNMENTS OF ERROR

The Court erred:

1. In making its oral decision on November 4, 1949,

denying the petitioner's petition for Writ of Habeas Corpus.

2. In reaffirming such oral decision of November 4, 1949, by subsequent oral decision on December 14, 1949.

3. In making its oral decisions of November 4, 1949, and December 14, 1949, without granting counsel for the petitioner an opportunity to present oral argument.

4. In making its oral decision of June 22, 1940, denying the petitioner's motion for reconsideration and reaffirming its prior oral decisions of November 4, 1949, and December 14, 1949.

5. In holding that compliance with the Administrative Procedures Act of June 11, 1946, by the Immigration Authorities, with regard to proceedings taken by them in a petitioner's case after its enactment was and is not required under the holding of the Supreme Court of the United States in the case of *Wong Yang Sung v. McGrath,* 339 U.S. 33.

6. In holding that the Immigration Authorities did not abuse their discretion in ordering the petitioner deported and that their decision in so ordering him deported was supported by substantial evidence.

7. In holding that the Court's scope of review in deportation cases was not broadend by *Wong Yang Sung* case *supra.*

8. In holding that the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *Yanish,*

et al. v. Barber, etc. (9 Cir.) 181 F. 2d 492, was not applicable to the instant case.

9. In making and entering paragraphs I to III, inclusive, of its Conclusions of Law.

10. In making and entering its Judgment herein, denying the petitioner's application for Writ of Habeas Corpus as prayed for and in discharging the petitioner's rule to show cause on July 27, 1950.

SUMMARY OF ARGUMENT

1. The court rendered its oral decisions denying the writ of habeas corpus on November 4, 1949 and December 14, 1949, without giving the appellant's counsel an opportunity for oral argument and the appellant's counsel was thus denied the privilege of making a full and adequate presentation of appellant's case.

2. The opinion of the Board of Immigration Appeals of July 5, 1948, which finally excluded the appellant and ordered his deportation was based, by its own terms, upon the *ex parte* statements of witnesses given in 1939, which the Board, in its previous opinion in 1942, discarded as not an "adequate procedure."

3. Proceedings were had before Immigration tribunals after the passage and effective date of the Administrative Procedures Act which were not in accordance with requirements of the Act.

ARGUMENT

1. Court's Failure to Permit Oral Argument

On July 19, 1949, after the first hearing upon the writ of habeas corpus, the matter was concluded by the following statement of the District Court (T.R. 94):

> "This matter is adjourned subject to call. In other words, it is understood that before I render an opinion I am going to call counsel in for the purpose of *asking at least argument on those phases that I feel I need help upon.*" (Italics ours)

No further proceedings were had until November 4, 1949, when both counsel appeared in court at the court's request. Without giving counsel for the appellant an opportunity to argue the case the court proceeded to render its oral opinion, denying the writ (T.R. 94). A second oral opinion was given by the District Court on December 14, 1949 (T.R. 97) and again no oral argument was permitted. In fact, counsel had no time to even request permission to argue the case because the court began giving its oral opinion in the exact manner as indicated by the transcript (T.R. 97 to 108). It is conceded that oral argument was permitted upon the motion for reconsideration but that was after the decision of the court, denying the writ, had been given and the mind of the court had obviously become crystallized upon the subject. It is submitted that it was the duty of the District Court to hear counsel before making up its mind and rendering the oral opinion and that failure of the District Court to give counsel the opportunity

which it had indicated counsel would be given, is reversible error.

2. The Board's Opinion of January 5, 1948, Based Upon Ex Parte Affidavits

The opinion of the Board of Immigration Appeals rendered on January 5, 1948, was, by its own terms, based upon the *ex parte* statements given by the witnesses Deskins, Clark and "Cekisch" (probably Vekich), and upon the appellant's testimony given before the American Consul.

We have already quoted a portion of the Board's opinion but for the convenience of the Court, we quote the following excerpt:

> "We simply point out that the statements of the witnesses Deskins (Ex. H of Ex. D) Clerk (Ex. F of Ex. D) and Cekisch (Ex. G of Ex. D), together with respondent's statements before the American Consul at Vancouver (Exs. B and C of Ex. D) contain sufficient evidence to support the conclusion reached by the board of special inquiry that respondent was a member of the Communist Party of America."

The statements referred to above by the Board of Immigration Appeals were the ex parte statements which the Board itself had already condemned in its opinion in 1942 *when it said*:

> "The Board of Special Inquiry developed the Act of 1918 charges through the introduction of three *ex parte* statements of three individuals who, it is alleged, are rivals of this alien in labor affairs of the Pacific Northwest. *The alien was not con-*

fronted with these individuals, and apparently his only means of rebutting the contents of their statements was by his repeated assertion that he was not a Communist and never had been. The procedure of a Board of Special Inquiry does not permit the alien's representation by counsel nor the right of confrontation by witnesses and the alien's cross-examination of adverse witnesses. Thus it is not a wholly adequate procedure to determine such a disputed factual issue as is presented in this case." (Italics ours)

Thus we have, in short, this situation. *The Board of Immigration Appeals' opinion of January* 5, 1948 *is based upon evidence that the Board condemned in* 1942.

The Board of Immigration Appeals refers in its opinion above quoted to the appellant's statement before the American Consul in Vancouver, which statements, Exhibit B of Government Exhibit D were given by appellant *at the time he requested and obtained from the American Consul, a visa.* There is nothing unfavorable in these statements, obviously, since the American Consul thought enough of them to issue the appellant a visa on the basis of them.

We, therefore, see from a careful analysis of the reasons given by the Board of Immigration Appeals for its holding that the appellant was a Communist, that they have no valid reasons at all, and *their whole opinion is based upon the* 1939 *ex parte statements which were discarded in* 1942 *by the Board itself.*

From the foregoing analysis of the evidence in this case and the opinion of the Board of Immigration Ap-

peals, it is clear that the order of deportation is based solely upon suspicion. In this regard the case of the *United States ex rel. Kettunen v. Reimer,* 79 F. (2d) 315, is in point. In this case the Immigration authorities sought to deport one Pauli Olavi Kettunen, a Finn, on the ground that Kettunen was a member of the Communist Party. The evidence showed that Kettunen attended a Communist meeting in 1932 in Duluth held in the rooms of the Finnish Workers Club in that city, and that he filled out and signed a blank application for membership, which he turned over to the local secretary at the party headquarters in Minneapolis. The facts also disclosed that he "probably" paid the initiation fee, but that his application was held in abeyance. He did sell a newspaper described as the "Daily Worker," an official organ of the Communist Party. There is really much stronger evidence unfavorable to Kettunen in the *Kettunen* case than to the appellant in the instant case, because in the instant case the appellant at no time made application for membership in the Communist Party, but merely was seen at meetings. In discussing this phase of the case, Judge Chase, speaking for the court, said:

> "In deciding this case, we shall not attempt to give a comprehensive definition of the word 'affiliation' as used in the statute. Very likely that is as impossible as it is now unnecessary. It is enough for present purposes to hold that it is not proved unless the alien is shown to have so conducted himself that he has brought about a status of mutual

recognition that he may be relied on to co-operate with the Communist Party on a fairly permanent basis. *He must be more than merely in sympathy with its aims or even willing to aid it in a casual intermittent way. Affiliation includes an element of dependablility upon which the organization can rely which, though not equivalent to membership duty, does rest upon a course of conduct that could not be abruptly ended without giving at least reasonable cause for the charge of a breach of good faith.* So tested we cannot agree that there was evidence to establish that this relator was affiliated with the Communist Party. His application for membership would indicate his then sympathy with its aims, but his reconsideration and failure to join show his unwillingness to let his sympathy control his actions, *and there is no proof which shows any mutual recognition that co-operation was to be expected from him.* In *United States ex rel. Yokinen v. Commissioner of Immigration,* 57 F. (2d) 707 (C.C.A.2) and *Wolck v. Weedin,* 58 F. (2d) 928 (C.C.A.9) active cooperation with the Communist Party was shown to support the charge of affiliation, and Yokinen had been a member of that party." (Italics ours)

Certainly in view of the foregoing language of the court and the evidence in the instant case, the Board of Immigration Appeals was entirely *unjustified* in holding that the appellant was a member of or affiliated with the Communist Party.

We fully appreciate the fact that the appellant entered the United States in 1940 without reporting to the Immigration authorities. However, the entire point of this proceeding is that by reason of the fact that the

Immigration held the appellant was subject to deportation for being a Communist under the Act of October 16, 1918, he is not eligible for the suspension of deportation which the Immigration has already given him permission to apply for. There is therefore no question at all but that the appellant's deportation would be suspended were it not for the holding of the Board of Immigration Appeals regarding Communism. In their opinion of January 5, 1948, contained in "Part VI" of the record, page 6, the following appears:

> "Section 19(d) of the Act of February 5, 1917, as amended, provides in part that aliens subject to deportation under the Act of October 16, 1918, as amended, are not eligible for suspension of deportation. We have found respondent subject to deportation under this Act. *For that reason alone we cannot suspend his deportation.* An order of deportation will be entered." (Italics ours)

So we see that the only thing that would keep the appellant from continuing to live in the country of his birth and supporting his wife and two children here is the holding of the Board of Immigration Appeals that he is a Communist. This holding, as we have pointed out, is entirely unjustified and unsupported by the evidence.

This case shows, on the whole, an entire disregard of vital human rights by the Immigration authorities. When the appellant was originally denied admission in 1939 it was without cause or provocation, and ever since that time he has been the subject of constant persecu-

tion by the Immigration Service. His persecution has continued over a period of almost ten years, during which time not one unfavorable bit of evidence has been introduced against the appellant. The opinion of the Board of Immigration Appeals of January 5, 1948, states in its own words, that it finds the appellant a Communist on a basis of the *ex parte* affidavits introduced in 1939, which were discredited by the Service itself. Such an opinion cannot in justice, fairness and law be allowed to stand.

We again invite the court's particular attention to that portion of the opinion of the Board of Immigration Appeals in 1942, found in "Part II," where they said:

> "The procedure of a Board of Special Inquiry does not permit the alien's representation by counsel, nor the right of confrontation of witnesses and the alien's cross-examination of adverse witnesses. Thus it is not a wholly adequate procedure to determine such a disputed factual issue as is presented in this case."

Yet, in its opinion of January 5, 1948, the same Board of Immigration Appeals based its opinion upon evidence that it had already declared was obtained by "not a wholly adequate procedure to determine such a disputed factual issue as is presented in this case."

The District Court in its oral decision (T.R. 94 to 108) completely ignored the above questions. We believe that the court failed in a thorough analysis of the

case because it did not have the benefit of an oral argument.

3. Proceedings Had Subsequent to the Effective Date of the Administrative Procedures Act

The Administrative Procedures Act was approved *June* 11, 1946. This case was argued before the Board of Immigration Appeals on *August* 24, 1945. However, the Board of Immigration Appeals had the case under consideration from the date of argument until January 5, 1948. *Therefore, it is clear that the Act was in effect during much of the time that the Board was taking proceedings in the case, and at the time its decision was rendered.* With reference to cases on appeal, the Act provides:

> "(b) SUBMITTALS AND DECISIONS.—Prior to *each* recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers *the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decision* (1) *proposed findings and conclusions, or* (2) *exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and* (3) *supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each finding, conclusion, or exception presented.* All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof." (Italics ours)

Let us now see whether this portion of the Act was complied with.

The Act says that the "parties" shall be afforded a "reasonable opportunity to submit for consideration of the officers participating in such decisions" proposed findings and exceptions, together with supporting reasons. *No such opportunity was afforded the appellant in this case.*

The Act also says that the record shall show the ruling upon "each such finding, conclusions, or exception presented." *The record does not so show in this case.*

The Act says that all decisions shall include, " a statement of findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law." *The decisions are not so written in this case.*

Under "Adjudication" the Act provides:

> "Sec. 5. In *every case* of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) NOTICE—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) PROCEDURE—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) SEPARATION OF FUNCTIONS—*The same officers who preside at the reception of evidence pursuant to section* 7 *shall make recommended decision or initial decision required by section* 8 *except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or*

agency review pursuant to section 8 *except as witness or counsel in public proceedings.* This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency." (Italics ours)

On March 12, 1948, the appellant made application for stay of deportation. This application was denied without compliance with the Act, and in fact, without even granting a hearing. On May 7, 1948, the appellant requested a re-opening for the purpose of introducing additional testimony. This was likewise denied without compliance with the terms of the Act and without a hearing.

The provisions of the Administrative Procedures Act that "No procedural requirements shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement," is so vague as to be completely meaningless. Evidently, this was the opinion of the Circuit Court in the Yanish case decided April 24, when it said:

"It appears that since the decision in *Wong Yang Sung v. McGrath,* 339 U.S. 33, holding the Administrative Procedure Act applicable to deportation proceedings, the regulations of the Department in respect of such proceedings have been amended to conform to that decision. Consult Federal Register, Vol. 15, No. 47, pp. 1298-1302. *These regulations,*

as we understand them, are applicable to proceedings inaugurated prior as well as subsequent to the effective date of the Administrative Procedure Act, no exceptions appearing therein." (Italics ours)

Reference to the regulations referred to shows that hey directed immediate compliance with the Admin- strative Procedures Act *without excepting* cases where he warrant of arrest was obtained prior to the effec- ive date of the Act. The rules and regulations referred o conclude as follows:

"This order shall become effective on the date of its publication in the Federal Register. It is necessary to supersede regulations relating to deportation procedure in Part 150 of Title 8 of the Code of Federal Regulations with new regulations to conform to the Supreme Court decision in the case of *Wong Yang Sung* (No. 154—October term, 1949) rendered on February 20, 1950. Since February 20, 1950, *all deportation hearings have been suspended.* The regulations set forth in this order are promulgated to conform to the principles enunciated in the above-mentioned court decisions and deportation hearings cannot be resumed until the regulations contained in this order become effective. Therefore, compliance with the provisions of section 4 of the Administrative Procedure Act (60 Stat. 238; 5 U.S.C. 1003) relative to notice of proposed rule making and delayed effective date is impracticable because the due and timely execution of the functions of the Immigration and Naturalization Service with respect to the conduct of deportation hear-

ings would be impeded and public interest would not be served by notice and delayed effective date.

(SEAL)

WATSON B. MILLER,
Comissioner of Immigration and Naturalization.

Approved: March 8, 1950

J. HOWARD MCGRATH,
Attorney General.''

SUMMARY AND CONCLUSION

In conclusion we invite attention to the witnesses furnished by the appellant who testified unequivocally in his favor. See the Immigration file relating to the appellant's hearing upon his petition for suspension of deportation in 1943 and 1944. The testimony of State Senator Frank L. Morgan, page 73; Rege Inman, page 82; Leonard Cochennett, page 90; State Representative Charles R. Savage, page 101; Denee Dyer, page 108; Ted Dokter, page 117; William R. McDonald, page 130; Harvey Nelson, page 138; Ray De Kraay, page 140; Clarence J. Williams, page 157; Howard F. Anderson, Scout Executive, page 158.

All of the foregoing were American citizens whose testimony stands unimpeached. The Immigration authorities entirely disregarded the testimony of these many witnesses. The District Court made the following observation in one of its oral decisions (T.R. 104):

> "Some of the witnesses who appeared for the petitioner may well have aroused considerable doubt in the Board of Inquiry as to their sincerity. It is unnecessary to name names but there was more than one whose endorsement would by some persons be viewed as the deserved 'kiss of death.' I may say that I have a high regard for Senator Morgan, now deceased. I have no reason to believe that the Board of Inquiry did not share that high regard."

The foregoing statement of the District Court is somewhat amazing in that there is not a shred of testi-

mony in the record which in any way impeaches the integrity and patriotism of any of the witnesses. It would seem that the District Court's attitude regarding the testimony only goes further to show its preconceived opinion as first evidenced by its lack of desire to hear oral argument of appellant's counsel.

The appellant was wrongfully prevented from returning to the United States from Canada in 1939 as determined by the Immigration authorities themselves that same year when the action of the border inspectors was reversed and the appellant was given specific permission by the Central Office in Washington to apply for a visa. Then when the appellant did exactly as the Central Office suggested that he might do and obtained a visa from the American Consul in Vancouver, he was again, and without any further reason, prevented from returning to his home in the United States by the same border officers. This second time he was prevented from returning on a basis of *ex parte* affidavits which the Board of Immigration Appeals later and in 1942 held to be insufficient and held that the hearing was unfair and it specifically gave the appellant permission to apply for suspension of deportation. Several years after the application for suspension was made, the Board of Review, apparently having forgotten what it said about the *ex parte* affidavits and the fact that it had held them improper and the hearing unfair, based an excluding decision upon the very self same affidavits.

Certainly such a manner of handling a case is grossly unfair and is not in keeping with the dignity and justice which should be characteristic of every branch of this Government. For these reasons a writ of habeas corpus should have been granted as prayed for.

Respectfully submitted,

EDWARDS E. MERGES,
Attorney for Appellant.